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IN THE SUPREME COURT OF THE UNITED STATES

LARRY SMALL; R. SCHELKE; E. CASTRO; D. JOHNSON; M.A. CORBIN; J. BUILTMAN, *Petitioners*,

v.

NARVIS G. NONNETTE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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70 pp

QUESTION PRESENTED

Whether a state prisoner's 42 U.S.C. § 1983 action for damages is barred where success would necessarily imply the invalidity of a prison disciplinary proceeding and plaintiff, who paroled after judgment and elected not to challenge the disciplinary proceeding in habeas corpus while the remedy was available to him, is currently ineligible for relief in habeas corpus.

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IN THE SUPREME COURT OF THE UNITED STATES

No._____

LARRY SMALL, et al., *Petitioners*,

v.

NARVIS G. NONNETTE, *Respondent.*

OPINIONS BELOW

The Court of Appeals' opinion (App. A) is reported at 316 F.3d 872. The district court's orders (Apps. B and C) are unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on December 26, 2002. (App. A.) A timely petition for rehearing en banc was denied on February 12, 2003. (App. D.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves the Civil Rights Act of 1871, § 1, 17 Stat. 13, Rev. Stat. § 1979, 42 U.S.C. § 1983 (1996), and the federal habeas corpus statute, 28 U.S.C. § 2254 (1996). Both statutes are reproduced in full in Appendix E.

STATEMENT OF THE CASE

At prison disciplinary hearings in July and August 1998, prison officials found Nonnette, a state prisoner, guilty of battery on an inmate and assessed 360 days good-time credit forfeiture plus 100 days in administrative segregation. In September 1998, Nonnette, proceeding pro se, filed a civil action alleging prison officials violated his constitutional rights by miscalculating his prison sentence, revoking good-time credits and imposing administrative segregation in a disciplinary proceeding without supporting evidence. The district court's jurisdiction was invoked under 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 1343(a)(3) (general civil rights jurisdiction). On August 5, 1999, the district court dismissed the miscalculation claim (App. B at 13-16), and on April 7, 2000, the court granted summary judgment for Petitioners on the disciplinary claim (App. C at 25-29). The district court based both rulings on the fact that Nonnette's § 1983 claims necessarily challenged the validity of the underlying decisions that caused his continued confinement. Because those determinations had not been set aside, the district court held Nonnette's action was barred by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Edwards v. Balisok*, 520 U.S. 641 (1997). Nonnette filed a notice of appeal on April 20, 2000, and he paroled on April 27, 2000.

On December 26, 2002, the Ninth Circuit Court of Appeals vacated and remanded. (App. A.) The court determined the unavailability of a remedy in habeas corpus because of mootness permits a claimant to maintain a § 1983 action for damages, even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits. (*Id.* at 4-8.) Preliminarily, the court held Nonnette had no available remedy in habeas corpus

because he already served 360 days additional incarceration and 100 days in administrative segregation, and the length of his parole would not be affected. (*Id.* at 5-6.) Thus, following *Spencer v. Kemna*, 523 U.S. 1 (1998), the court reasoned if Nonnette filed a habeas petition it would have to be dismissed as moot for lack of a case or controversy. (App. A at 5-6.)

The Ninth Circuit acknowledged resolution of the issue in this case is "not entirely clear under *Heck* and its progeny[.]" (*Id.* at 6.) Nonetheless, the court joined the Second and Seventh Circuits—without analysis of authority from those circuits or contrary authority from the First, Fifth and Sixth Circuits—to conclude a § 1983 action may be maintained even though success in that action would imply invalidity of the disciplinary proceeding that caused the credit revocation, because Nonnette is without an available remedy. (*Id.* at 6-8.) The Ninth Circuit considered Nonnette's changed circumstances after the district court entered judgment (namely, his release to parole), and refused to affirm where doing so would leave him with no conceivable remedy if his constitutional objections are meritorious. (*Id.* at 9.) Nonnette also asked the Court of Appeals to find *Heck* does not bar his challenge to his placement in administrative segregation because *Heck* applies only to claims challenging the fact or duration, and not conditions, of confinement. (*Id.* at 10-11.) The Court of Appeals did not go so far, but held, despite Nonnette's failure to make the argument in the district court, *Heck* does not bar *any* of his claims and the court need not address whether he failed to establish an independent ground for precluding application of *Heck* to his administrative segregation claim. (*Id.*)

Nonnette discharged from parole on April 27, 2003.

REASONS FOR GRANTING THE WRIT

Like *Preiser*, *Heck* and *Edwards* before it, this case "lies at the intersection of the two most fertile sources of federal-court prisoner litigation[,]" *Heck*, 512 U.S. at 480—the federal civil rights statute, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254. This case raises vitally important and frequently recurring issues of procedural law governing these competing federal statutes, which are most heavily litigated by this nation's prisoners. The decision below stands existing Supreme Court authority on its head and deepens a circuit split on the meaning of this Court's fractured decision in *Spencer*, and the validity of efforts by prisoners to circumvent the so-called "favorable-termination" rule prescribed by this Court in *Heck* and *Edwards*. The Court of Appeals' decision erroneously permits prisoners who sleep on their rights while incarcerated to file federal civil rights damages actions challenging prison disciplinary decisions when they are released to parole without previous, successful pursuit of state or federal habeas corpus relief from adverse prison disciplinary determinations. Also, the decision greatly expands § 1983 litigation further than Congress or this Court intended, with overwhelmingly negative implications to the federal judiciary and prison officials everywhere. Accordingly, plenary review by this Court is necessary to correct a decision which directly conflicts with controlling authority from this Court and with decisions of other federal courts of appeals on an important matter, and calls for the exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a) & (c); *see also United States v. Donovan*, 429 U.S. 413, 422 (1977) (certiorari may be granted where the issues simply "concern the construction of a major federal statute").

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS REGARDING CIVIL RIGHTS AND HABEAS CORPUS JURISPRUDENCE

The Ninth Circuit's decision that a prisoner who failed to overturn a prison disciplinary finding in habeas corpus while the remedy was available may later take advantage of his fortuitous parole to maintain an action for damages pursuant to § 1983 is at war with established precedent from this Court. *See* Sup. Ct. R. 10(c). This Court's decision in *Preiser v. Rodriguez*, clearly demonstrates a prisoner's challenge to the fact or duration of confinement and request for speedier release lies exclusively within the core of habeas corpus jurisprudence. *Preiser*, 411 U.S. 475, 488-90. A prisoner cannot circumvent the exhaustion requirements of federal habeas corpus by instead labeling his case as a § 1983 claim. *Id.* This Court clarified, "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983." *Id.* at 490.

In *Heck v. Humphrey*, this Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination,

> or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Heck, 512 U.S. at 486-87 (n. omitted). This Court's rationale was based, in part, on a desire to "avoid[] parallel litigation over the issue of probable cause and guilt," prevent "the creation of two conflicting resolutions arising out of the same or identical transaction," and preclude "a convicted criminal defendant [from making a] . . . collateral attack on the conviction through the vehicle of a civil suit." *Id.* at 484 (internal quotation marks and citations omitted). Critically, this Court emphasized "the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n.10.

In *Edwards v. Balisok*, a prisoner sued under § 1983 for due process violations in an administrative disciplinary action which resulted in isolation, segregation and loss of good-time credits. *Edwards*, 520 U.S. at 643. The prisoner sought monetary damages, and injunctive and declaratory relief, but he did not seek restoration of credits. *Id.* at 643-44. This Court unanimously held that, because victory for the plaintiff would imply the invalidity of his punishment (because deprivation of a liberty interest without due process is unconstitutional), *Heck* barred his damages and declaratory claims. *Id.* at 647-48. This Court did not distinguish the credit revocation from other punishments imposed (isolation and segregation).

Nonnette's § 1983 action falls squarely within the type proscribed by *Preiser*, *Heck* and *Edwards*. At the district court, he claimed Petitioners violated his due process rights by improperly revoking good-time credits based on insufficient evidence in prison disciplinary proceedings and that the alleged violation extended his release date. (*See* Apps. B and C.) For

the first time before the Court of Appeal, he attempted to bootstrap an additional challenge to the administrative segregation aspect of his punishment as a separate condition of confinement claim, which he argued was not subject to *Heck*'s favorable-termination rule. (*See* App. A at 10-11.) The distinction is irrelevant. As in *Edwards*, both punishments flowed directly from the disciplinary *proceeding*, such that granting him relief on either would necessarily imply the invalidity of the proceeding and resulting punishment. *See Edwards*, 520 U.S. at 647-48. Because a judgment in Nonnette's favor would "necessarily imply the invalidity" of a prison disciplinary proceeding, his claim is not cognizable under § 1983 unless he can show the adverse finding or punishment has been invalidated. *See Edwards*, 520 U.S. at 643, 645, 647-48; *Heck*, 512 U.S. at 486-87. The Court of Appeals contradicted *Heck* and *Edwards*, and permitted a collateral attack when it excepted Nonnette from the favorable-termination rule, even though *Heck* provides no such exception.

Had the Court of Appeals followed controlling authority from this Court, it would have held a prisoner cannot take advantage of his fortuitous parole to revive an unexhausted habeas claim masquerading as a § 1983 claim, particularly where the prisoner remained incarcerated for *twenty-one months* after the challenged disciplinary proceeding, giving him ample time in which to obtain relief in habeas corpus. *See* 28 U.S.C. § 2254(a). Instead, the Court of Appeals reached the counterintuitive conclusion that Nonnette's release to parole *after* the district court entered judgment would leave him with no conceivable remedy. (App. A at 5-6, 9.) This finding is legally incorrect. For habeas purposes, "custody" includes not only incarceration, but also other restraints on liberty, such as parole. *See, e.g.*, *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963). A person's subsequent release does not moot a petition for writ of habeas corpus. *Carafas v. LaVallee*, 391 U.S. 234,

238 (1968). Further, a California parolee is in constructive custody and may file a habeas corpus petition for credit restoration. *See Moreno v. State of California*, 25 F. Supp. 2d 1060, 1062-1063 (N.D. Cal. 1998); *People v. Lara*, 254 Cal. Rptr. 360, 206 Cal. App. 3d 1297, 1301-03 (1988); *In re Kemper*, 169 Cal. Rptr. 513, 112 Cal. App. 3d 434, 436-40 (1985); *see also* Cal. Code Regs. tit. 15, §§ 3323(k) (governing calculation of parole period when inmate is held beyond parole date because of disciplinary action), 3327 (governing restoration of forfeited credits) and 3901.11.1 (allows parolee to file for reconsideration of length of parole). Thus, Nonnette also had habeas relief available to him during his three-year parole period, and he procedurally defaulted his § 1983 action by eschewing the available habeas remedy when he was in actual and constructive custody. In holding otherwise, the Ninth Circuit ignored and nullified state law. Certiorari is appropriate to correct this fundamental error. *See Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (summarily reversing the court of appeals' interpretation of state abortion law, explaining that "we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law").

In any event, the Court of Appeals' determination that a prisoner *must* have an available remedy in § 1983 if habeas relief is unavailable, directly conflicts with this Court's prescription for the federal judiciary in § 1983 jurisprudence. It is not the federal court's province, Justice Scalia wrote for the majority in *Heck*, to "provide a remedy for all conceivable invasions of federal rights," a result which would alter the "entire landscape of our § 1983 jurisprudence." *Heck*, 512 U.S. at 490 n.10. Indeed, the Court of Appeals' underlying assertion that litigants claiming constitutional violations *must* be afforded a federal remedy is dubious. This Court has held the authority

for the "principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in federal district court . . . is difficult to discern. It cannot lie in the Constitution, . . . [a]nd no such authority is to be found in § 1983 itself." *Allen v. McCurry*, 449 U.S. 90, 103 (1980). In *Withrow v. Williams*, 507 U.S. 680, 723 (1993) (Scalia, J., concurring & dissenting), Justice Scalia observed "[i]t would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not)." Here, the Court of Appeals' interpretive enterprise rewrites § 1983 jurisprudence in a manner unintended and unauthorized by this Court.

As justification for its radical departure from controlling authority, the lower court relies on dicta by a plurality in *Spencer* to except Nonnette from *Heck*'s favorable-termination rule. (App. A at 6-8.) In *Spencer*, five Justices announced in dicta they would only apply the rule to prisoners who can assert their claims in a habeas proceeding. The issue in *Spencer* was whether a prisoner's habeas petition, which sought to invalidate an order revoking his parole, still presented a justiciable case or controversy after his reincarceration ended. Eight Justices held it did not. *Spencer*, 523 U.S. at 7, 14-18. In an attempt to demonstrate an injury-in-fact, the prisoner argued his habeas petition could not be moot because, if it were, *Heck*'s favorable-termination rule would bar him from bringing a § 1983 action, and he would be left without any federal forum in which he could seek redress for the parole revocation. *Id.* at 17. Justice Scalia, writing for the majority, reaffirmed footnote ten in *Heck* and dismissed the prisoner's contention as "a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.* However, five Justices—four in a concurrence, one in a dissent—expressly rejected the majority's "great non sequitur"

dictum and said the favorable termination rule applies "only [to] inmates seeking § 1983 damages for unconstitutional conviction or confinement." *Id.* at 20-21 (Souter, J., concurring, joined by O'Connor, Ginsburg & Breyer, JJ.); *id.* at 25 n.8 (Stevens, J., dissenting) (agreeing with Justice Souter's position). Current and former prisoners who cannot seek habeas relief, they said, can bring a § 1983 claim without satisfying the favorable-termination rule even if they are challenging the legality of their conviction or the fact or duration of confinement. *Id.* at 21.

Notwithstanding the inapplicability of *Spencer* dicta to the facts in this case, *see post* at 20-21, the Court of Appeals' reliance on *Spencer* dicta is irreconcilable with this Court's clear caveat that lower courts follow precedent with direct application, even if the reasons appear to have been rejected in some other line of decisions, leaving to this Court the prerogative of overruling its own decision. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Aside from succumbing to the dubious practice of relying on dicta from concurring and dissenting opinions, *see Agostini*, 521 U.S. at 217 (cautioning that "statements made by five Justices . . . do not, in themselves, furnish a basis for concluding that our jurisprudence has changed"), the Court of Appeals failed to recognize that *Heck* applies regardless of whether the plaintiff is incarcerated. *Heck*, 512 U.S. at 490 n.10. Because § 1983 provides for suits alleging "deprivation of any rights . . . secured by the Constitution," 42 U.S.C. 1983, "there has been no injury of constitutional proportions" unless the plaintiff, whether in custody or not, can show the punishment has been reversed. *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995).

A writ of certiorari should issue because the Court of Appeals' decision directly conflicts with *Preiser*, *Heck* and *Edwards*, and improperly relies on dicta by a plurality in

Spencer to speculate how this Court might, if at all, modify or restrict *Heck*'s application under the circumstances. *See* Sup. Ct. R. 10(c).

II.

THE CIRCUITS ARE DEEPLY DIVIDED OVER WHETHER A FORMER PRISONER WHO IS WITHOUT RELIEF IN HABEAS CORPUS CAN MAINTAIN AN ACTION FOR DAMAGES UNDER 42 U.S.C. § 1983

This case presents this Court with an opportunity to resolve a clear circuit split on a recurring issue with important implications for prisoner federal civil rights and habeas corpus litigation. Petitioners maintain Nonnette had habeas relief available to him during the twenty-one months he was incarcerated after the challenged prison disciplinary proceeding, as well as during the three years he was on parole, and his failure to pursue such relief operates as a procedural default to preclude him from bypassing *Heck*'s favorable-termination requirement in the district court. However, because the Ninth Circuit reversed and remanded and Nonnette discharged from parole during this appeal (April 27, 2003), habeas relief is no longer available. The issue remains whether he can maintain an action for damages under § 1983 where he is without relief in habeas corpus, even though success in this action would imply the invalidity of a prison disciplinary proceeding. This important issue evenly divides the circuits and is ripe for clarification by this Court. *See* Sup. Ct. R. 10(a). Indeed, the lower court acknowledged "the answer is not entirely clear under *Heck* and its progeny." (App. A at 6.) Similarly, the Seventh Circuit called it an "open question." *Dewalt v. Carter*,

224 F.3d 607, 617 n.5 (7th Cir. 2000). *See also* Nonnette's Supplemental Opening Brief at 1, 8, 17-22 (discussing "circuit split" on an "open question"); Bruce Ellis Fein, *Heck v. Humphrey After Spencer v. Kemna*, 28 New Eng. J. on Crim. & Civ. Confinement 1, 24 (2002) (urging Supreme Court to "resolve the circuit split"; circuit split "fits the bill" for grant of certiorari); Jason A. Jones, Note, *Prisoner Litigation and the Mistake of Jenkins v. Haubert*, 86 Cornell L. Rev. 140, 165 (2000) (urging Supreme Court to provide "a more clearly defined rule").

A. This Case Squarely Presents An Intolerable Conflict

Where the federal civil rights and habeas corpus statutes intersect, confusion abounds. The Ninth Circuit's decision, which follows decisions by the Second and Seventh Circuits, directly conflicts with decisions by the First, Fifth and Sixth Circuits. The latter have held *Heck* does not recognize an equitable exception to the favorable-termination rule for prisoners, or former prisoners, who are habeas-ineligible. In *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998), the First Circuit determined that because a § 1983 plaintiff's decedent had died in custody, habeas corpus was unavailable. *Id.* at 80-81. The court rejected appellants' argument that refusing to allow the suit to proceed was fundamentally unfair:

> [A]nnulment of the underlying conviction is an element of a section 1983 "unconstitutional conviction" claim. Creating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action.

Id. at 81 (citation and n. omitted). The § 1983 suit was nevertheless barred, because the court held that *Heck* had not been supplanted by dicta in *Spencer*. *Id.* at 81 n.3. In *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam), the Fifth Circuit applied *Heck* to find a former prisoner who was no longer in custody for the disputed term of confinement, and thus unable to obtain habeas relief, could not recover damages under § 1983 for his alleged unconstitutional confinement, absent a showing that his conviction had been overturned or invalidated. And in *Huey v. Stine*, 230 F.3d 226 (6th Cir. 2000), a § 1983 prisoner-plaintiff alleged, like Nonnette, that because he had long since served the challenged prison disciplinary punishment, he was not subject to *Heck*'s favorable-termination rule, because doing so would deprive him of a federal forum. *Id.* at 229. The Sixth Circuit rejected the claim, determined *Heck* controlled, and refused to prognosticate the direction this Court might take in years to come based on dicta in *Spencer*. *Id.* at 229-30.

Critically, the First, Fifth and Sixth Circuits each recognized that while dicta by a plurality in *Spencer* "may cast doubt upon the universality" of *Heck*'s favorable-termination requirement, *Figueroa*, 147 F.3d at 81 n.3, *Randell*, 227 F.3d at 301, *Huey*, 230 F.3d at 230, lower courts are ultimately bound by this Court's directive that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237 (citation omitted). Indeed, the Ninth Circuit previously followed this deferential standard with respect to *Spencer*'s treatment of *Heck*. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 n.6 (9th Cir. 1988) (per curiam) (noting that, after *Spencer*, "it is questionable whether *Heck*'s holding would command a majority of the Supreme Court today" but that "*Heck* remains good law"). Curiously, the

decision below does not mention or analyze any of the competing opinions from sister circuits, nor does it mention *Cabrera* and the resulting intra-circuit strife.

On the other side of the split, the Second, Seventh and now Ninth Circuits have liberally construed dicta in *Spencer* to find the favorable-termination rule inapplicable when habeas relief is unavailable. (App. A at 7-8 & n.5.) In *Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001), the plaintiff challenged the duration of her son's confinement in a § 1983 action after he served time in custody. *Id.* at 68-69, 75. The Second Circuit counted up concurring dicta in *Spencer* to determine *Heck* did not bar the action because the challenge was directed to the duration of confinement and not the validity of the conviction, and there was no habeas remedy because the claimant had been released from custody. *Id.* at 75; *see also Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999) (stating either § 1983 or habeas must be available). In *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999), the Seventh Circuit held a § 1983 claimant subsequently released from prison after the suit was filed could no longer obtain relief in habeas corpus, which was his only remaining route for reversing a prison disciplinary sanction. The court allowed the § 1983 action to continue because it determined dicta in *Spencer* "cast[] sufficient doubt on the applicability of *Heck*." *Id.*

The Second, Seventh and Ninth Circuits' reliance on counting up concurring votes in *Spencer* impugns this Court's admonition that lower courts abstain from the dubious practice of relying on dicta from concurring and dissenting opinions to conclude this Court's jurisprudence has changed. *See Agostini*, 521 U.S. at 217. These circuits also fail to recognize *Heck* applies regardless of whether the plaintiff is incarcerated. *Heck*, 512 U.S. at 490 n.10.

The disarray is further reflected in federal district courts in circuits which have not weighed in on the issue. *See, e.g., Gallo v. City of Philadelphia*, No. CIV.A.96-3909, 1999 WL 1212194, at *8 n.25 (E.D. Pa. Dec. 17, 1999) ("There is also serious doubt as to whether *Heck* applies to litigants who . . . are not in custody, *see Spencer v. Kemna,* 118 S. Ct. 978, 989 (1998) (Souter, J. concurring)."); *United States v. Bohn*, No. 92-61-02, 1999 WL 1067866, at *4 (E.D. Pa. Nov. 9. 1999) (*Spencer* "may have cast doubt on certain aspects of *Heck*"); *Ways v. City of Lincoln*, No. 4:00CV3216, 2002 WL 1742664, at *9-10 (D. Neb. Jul. 29, 2002) (§ 1983 plaintiff who is "merely fined" is without relief in habeas corpus and exempt from *Heck*'s favorable-termination rule); *Dolney v. Lahammer*, 70 F. Supp. 2d 1038, 1042 n.1 (D. S.D. 1999) ("individuals who have no recourse to habeas relief, because they are not 'in custody', come within the 'broad reach' of § 1983"; § 1983 action denied where plaintiff had been in custody as prisoner and parolee and could have obtained relief in habeas, but instead sought damages under § 1983).

As these cases demonstrate, the issue has fully percolated among the lower courts, the conflict is widespread, and continued disagreement among the lower courts brings intolerably disparate results. Plenary review by this Court is necessary to resolve the discordant views in the circuits regarding the proper application of *Heck* and *Spencer*. *See* Sup. Ct. R. 10(a).

B. The Issue Presented By The Conflict Is Recurring And Of Great Practical Importance

The identified circuit split itself manifests the frequent and pervasive confusion among the lower courts, which inherently results in discrepant legal rulings. The national importance of the issue is underscored by the majority in *Heck*, which

described the § 1983 and habeas statute crossroads as "the intersection of the two most fertile sources of federal-court prisoner litigation." *Heck*, 512 U.S. at 480. Statistics support the description. Of 250,907 civil actions commenced in federal district courts from September 2000 to September 2001, prisoners filed 58,805 actions, or twenty-three percent of the judiciary's caseload. "Judicial Business of the United States Courts 2001," Table C-2, available at http://www.uscourts.gov/judbus2001/contents.html. Prisoner habeas corpus and § 1983 actions unequivocally represent the largest number of federal civil suits by jurisdiction. *See id.* (of 58,805 prisoner actions, 24,486 were habeas corpus petitions and 24,118 were § 1983 suits).

While the sheer volume of prisoner actions alone is staggering, the decision below courts disaster and threatens to increase prisoner litigation dramatically at the expense of efficient judicial administration. The opinion essentially sanctions a prisoner's decision to pursue the incorrect statutory vehicle in which to seek redress for alleged constitutional violations, despite controlling authority which denounces ignorance of the law as an excuse, *Lambert v. California*, 355 U.S. 225, 228 (1957), even for pro se litigants, *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). It also contravenes the controlling *Heck* majority, which held the favorable-termination requirement brooked no exception for § 1983 plaintiffs to whom habeas or any other federal channel to challenge their convictions was foreclosed. *Heck*, 512 U.S. at 490 n.10. The opinion gives no weight to procedural requirements, and instead results in perverse incentives for prisoners. The Court of Appeals' sweeping application of dicta in *Spencer* would permit an inmate to revive expired claims upon release from prison and reward inmates for failing to diligently pursue state-based remedies, as required by *Heck*. Thus, a prisoner would be able

to sidestep the favorable-termination requirement simply by waiting out his sentence.

Further, this Court has never intended § 1983 to be a catch-all federal vehicle for litigants to raise purported constitutional violations by state officials. *See ante* at 8-9; *Allen*, 449 U.S. at 103; *Withrow*, 507 U.S. at 723. Thus, the decision below is a hard one with which to live, not only as a matter of precedent but also as a matter of institutional health. It impermissibly expands § 1983 far beyond the limited scope it was originally intended to have. *See Heck*, 512 U.S. at 491 (Thomas, J., concurring, and cases cited therein). It opens federal courthouse doors to substantially more prisoner litigation, and exposes countless prison officials to untimely damages actions.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals. *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where the circuits disagreed on the proper application of federal habeas corpus statute "[b]ecause uniformity among federal courts is important on questions of this order"). This Court should grant certiorari to resolve the intra- and inter-circuit conflict, and illuminate the procedural standard that will identify state prisoners' rights to access federal court. *See* Sup. Ct. R. 10(a).

III.

THE DECISION BELOW REFLECTS WIDESPREAD UNCERTAINTY OVER THE MEANING OF *SPENCER*, WHICH THIS COURT ALONE CAN DISPEL

As noted, reactions by the lower courts to dicta in *Spencer* has not been uniform. In an attempt to reconcile conflicting holdings and dicta in *Heck* and *Spencer*, the circuits are split over whether a state convict ineligible for habeas corpus should be allowed to bring a civil rights suit which would impugn his conviction or prison discipline. The First, Fifth and Sixth Circuits have held *Heck* does not recognize an equitable exception to the favorable-termination rule for prisoners, or former prisoners, who are unable to obtain habeas relief, *see Figueroa*, 147 F.3d at 80-81, *Randell*, 227 F.3d at 301, *Huey*, 230 F.3d at 229-30, while the Second, Seventh and Ninth Circuits have applied dicta in *Spencer* to find the favorable-termination rule inapplicable when habeas relief is unavailable, *see Huang*, 251 F.3d at 75, *Carr*, 167 F.3d at 1127, App. A at 8-12. The split demonstrates dicta in *Spencer* has thrown this Court's precedents into disarray, which calls for this Court to exercise its supervisory authority to ensure procedural uniformity. *See* Sup. Ct. R. 10(a).

Spencer's implications are in need of clarification. This case can form an important development in the road map this Court has constructed over time with several related rulings in prisoner civil rights and habeas corpus law. One commentator has observed:

> The Supreme Court's rationale in *Heck* was relatively straightforward: it would be improper for a prisoner

> to use a civil damages action to circumvent the habeas statute's strict requirements. The real difficulty began after the Court made the jump in *Edwards*, extending the favorable-termination rule to disciplinary sanctions that revoked good-time credits. While *Edwards* was a unanimous opinion, the holding's breadth remains unclear. The four separate opinions in *Spencer v. Kemna* certainly did not help clean up the mess.

Jones, *supra*, at 165. As Justice Thomas explained in his concurring opinion in *Heck*, it is this Court who has put § 1983 and the habeas statute on a "'collision course,'" *Heck*, 512 U.S. at 491 (Thomas, J., concurring) (quoting Souter, J., concurring, 512 U.S. at 492), by expanding the statutes "far beyond the limited scope either was originally intended to have." *Id.* (citations omitted). Clarification of the federal court's gatekeeping function in state prisoner civil rights and habeas corpus actions invokes this Court's position at the apex of the federal judicial system. "Given that the Court created the tension between the two statutes, it is proper for the Court to devise limitations aimed at ameliorating the conflict, provided that it does so in a principled fashion." *Id.* (citations omitted). This case allows this Court to direct traffic at the intersection of prisoner habeas and civil rights claims and provide a more clearly defined rule that precludes recovery under § 1983 for a current or former prisoner unless he satisfies the favorable-termination rule. It would help to relieve the confusion of lower courts and the bar if this Court clarified the rule for all federal courts who are dubiously counting up concurrences and interpreting dicta to predict how this Court would rule under these circumstances.

IV.

THE DECISION BELOW IS INCORRECT

As noted, the court below erred in finding Nonnette was without relief in habeas corpus. Instead, his failure to pursue available habeas remedies during the twenty-one months he was incarcerated after the challenged disciplinary determination, and during the three years he was on parole operate as a procedural default precluding his § 1983 action. *See ante* at 7-8. Petitioners have also detailed the lower court's error in finding a habeas-ineligible claimant may maintain a § 1983 action where success in that action would necessarily imply the invalidity of a prison disciplinary proceeding. *See ante* at 8-10. Moreover, even though Nonnette is now ineligible for relief in habeas corpus, dicta in *Spencer* has no application to this case. Unlike *Spencer*, where the federal habeas petition was moot because the convict had completed his *entire* term of imprisonment, *Spencer*, 523 U.S. at 3, 7-16, 21, Nonnette could have obtained relief in habeas during his incarceration and parole periods. *See ante* at 7-8. Therefore, *Heck*'s favorable-termination requirement applied and the court erred by injecting dicta from *Spencer*.

Even if *Spencer* dicta applies, the court erred when it found Nonnette falls within the class of persons who the plurality believes is exempt from the favorable-termination rule. In *Spencer*, Justice Souter narrowly tailored the exemption to individuals for whom it is "impossible as a matter of law" to obtain habeas relief. *Spencer*, 523 U.S. at 21 (Souter, J., concurring). To determine which individuals Justice Souter deemed outside the intersection of § 1983 and the habeas statute, one need look no further than his concurring opinion in *Heck*. There he identified, for example, "people who were

merely fined, . . . or who have completed short terms of imprisonment, probation or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences," as individuals who should be exempt from the favorable-termination rule. *Heck*, 512 U.S. at 500 (Souter, J., concurring). Essentially, the plurality was concerned with the practical availability of effective federal review of a prisoner's constitutional claims. *See id.*; *Spencer*, 523 U.S. at 21.

In this case, it was not "impossible as a matter of law" for Nonnette to seek habeas relief. He was not subject to a mere fine or a short term in custody. He was aware of the alleged constitutional violation and filed suit under § 1983 within a month of the challenged proceeding. Instead of properly seeking relief in habeas, Nonnette sat on his habeas rights while he was incarcerated for twenty-one months after the challenged proceeding. He even filed a notice of appeal while he was incarcerated. That he opted to pursue relief under a different, albeit incorrect, statute constitutes procedural default on his § 1983 claim. He did not lack a practical opportunity to seek to overturn the underlying state determinations in habeas corpus, either before or after he paroled. The Court of Appeal read the *Spencer* plurality's qualifications for exemption from *Heck* too broadly. To carve an exception for Nonnette on these facts contradicts controlling authority which denounces ignorance of the law as an excuse, *Lambert*, 355 U.S. at 228, even for pro se litigants, *King*, 814 F.2d at 567. Thus, the lower court erred in its illogical and impractical application of dicta in *Spencer*.

Last, the lower court erred when it remanded Nonnette's separate challenge to placement in administrative segregation. (*See* App. A at 10-11.) The lower court determined that because the punishment flowed from a hearing which allegedly violated due process, it should be remanded "without regard to the

Sandin requirements." (*Id.*) Petitioners maintain *Edwards* is directly on point; that is, *Heck*'s favorable-termination rule is applicable where, as here, a prisoner challenges the procedures used by the prison to deprive him of good-time credits. *See Edwards*, 520 U.S. at 648; *see ante* at 6-7. The resulting punishments in this case (good-time credit revocation and administrative segregation) are indistinguishable—they both flowed directly from the disciplinary *proceeding*, such that granting relief on either would necessarily imply the invalidity of the disciplinary proceeding. *See Edwards*, 520 U.S. at 647-48. Moreover, the lower court's complete disregard for *Sandin v. Conner*, 515 U.S. 472 (1995) cannot be countenanced. In *Sandin*, this Court held due process protections are not implicated unless a prisoner is subjected to an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Id.* at 486. This Court held thirty days of disciplinary segregation is not an "atypical and significant hardship." *Id.* The circuits—including the Ninth Circuit before this case—are in accord. *See, e.g., Dominique v. Weld*, 73 F.3d 1156, 1160-61 (1st Cir. 1996) (transferring inmate from work-release program to medium-security facility did not implicate a protected liberty interest, thus did not violate due process); *Torres v. Fauver*, 292 F.3d 141, 143, 149-51 (3rd Cir. 2002) (holding that even though prisoner's condition of confinement claim was not barred by *Heck*, defendant correctional officials were entitled to summary judgment, because under *Sandin* the prisoner did not have a due process right to remain free from administrative segregation); *Beverati v. Smith*, 120 F.3d 500, 502-04 (4th Cir. 1997) (six months of administrative segregation is not an atypical and significant hardship); *Jones v. Baker*, 155 F.3d 810, 812-13 (6th Cir. 1998) (two and one-half years of administrative segregation is not an atypical and significant hardship); *Crowder v. True*, 74 F.3d 812, 814-15 (7th Cir. 1996) (per curiam) (federal prisoner segregation does not create a constitutionally protected liberty interest); *Jacks v.*

Crabtree, 114 F.3d 983,986 n.4 (9th Cir. 1997) (denial of one year sentence reduction is not an atypical and significant hardship); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (under *Sandin*, a prisoner has no liberty interest in remaining free from segregation pending a disciplinary hearing because "administrative segregation falls within the terms of confinement ordinarily contemplated by a prison sentence"); *Talley v. Hesse*, 91 F.3d 1411, 1413 (10th Cir. 1996) (placement in administrative segregation does not give rise to a liberty interest; thus, procedures involved need not comply with due process). Thus, not only did the Court of Appeals err in distinguishing the punishments, it erred by remanding the matter to determine if the disciplinary hearing violated due process on Nonnette's separate segregation claim, when, under *Sandin*, a prisoner has no due process right to remain free from disciplinary segregation.

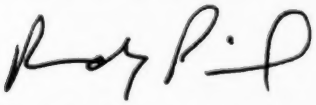
The district court's dismissal and grant of summary judgment for Petitioners was correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Narvis G. NONNETTE, Plaintiff-Appellant,
v.
Larry SMALL; R. Schelke; E. Castro; D. Johnson; M.A. Corbin; J. Builtman,
Defendants-Appellees.

No. 00-55702.

Argued and Submitted May 9, 2002.
Filed Dec. 26, 2002.

Appeal from the United States District Court for the Southern District of California;
Anthony J. Battaglia, Magistrate Judge, Presiding.
D.C. No. CV- 98-01716-AJB.

Before: LAY, [FN*] CANBY and PAEZ, Circuit Judges.

FN* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

CANBY, Circuit Judge.

Plaintiff Narvis Nonnette brought this civil rights action pursuant to 42 U.S.C. § 1983, alleging that officials of the Calipatria State Prison in California violated his constitutional rights by: (1) miscalculating his prison sentence and (2) revoking 360 days of his good-time credits and imposing 100 days of administrative segregation in a disciplinary proceeding without supporting evidence. The district court dismissed the miscalculation claims and granted summary judgment for the

defendants on the disciplinary claim. The district court based both rulings on the fact that Nonnette was a state prisoner and that his civil rights claims necessarily challenged the validity of the underlying decisions that caused his continued confinement. Because those determinations had not been set aside, the district court held that *Heck v. Humphrey,* 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), precluded Nonnette from maintaining his § 1983 action.

Nonnette appeals the district court's rulings. He points out that he has now completed serving the incarceration portion of his sentence (including the additional year that resulted from his disciplinary proceeding) and has been released to parole. He argues that, because any direct challenge to his disciplinary proceeding would be moot, *see Spencer v. Kemna,* 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), he must be allowed to maintain his § 1983 action. We conclude that he is correct, and we therefore vacate the decision of the district court and remand for further proceedings.

Background

Nonnette's disciplinary proceeding arose out of an inmate fight in July 1998. Nonnette was found to have stabbed another inmate, despite his contention that all of the evidence indicated that the inmate had been stabbed before Nonnette joined the fight. Nonnette was assessed 360 days loss of good-time credits, and was placed in administrative segregation for 100 days. [FN1]

> FN1. The disciplinary decision originally imposed a term of 15 months in a segregated housing unit. That term was later suspended, but Nonnette served 100 days of administrative segregation.

Nonnette filed a complaint in the U.S. District Court for the Southern District of California alleging three due process

violations pursuant to 42 U.S.C. § 1983. [FN2] The first two claims asserted that Nonnette's release date initially had been improperly calculated, and that he wrongfully had been denied work credits that would have led to an earlier release. The third cause of action asserted that his due process rights were violated by his disciplinary proceeding and the ensuing loss of good-time credits and administrative segregation. The complaint sought injunctive relief and damages.

> FN2. Nonnette first exhausted his prison administrative remedies, thereby satisfying that requirement of the Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e(a).

The district court dismissed Nonnette's first two causes of action for failure to state a claim. *See* Fed.R.Civ.P. 12(b)(6). The court held that, because the claims challenged the validity of the decisions underlying Nonnette's confinement, Nonnette was required to proceed first in habeas corpus, *see Preiser v. Rodriguez,* 411 U.S. 475, 488-90, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973), and could not bring a § 1983 action for damages until he had succeeded in invalidating his confinement through habeas. *See Heck,* 512 U.S. at 486-87, 114 S. Ct. 2364. The district court declined to dismiss Nonnette's third claim, because Nonnette asserted that he had received a paper invalidating his disciplinary proceeding. Upon the State's later motion for summary judgment, however, the evidence indicated that the disciplinary ruling remained in force, and the district court accordingly granted summary judgment on the third claim on the authority of *Heck.*

Discussion

Both parties concentrate their arguments on the summary judgment ruling, indicating that those arguments will also apply to the dismissals of the first two claims. We follow the same course in our analysis. We review de novo both grants

of summary judgment and dismissals for failure to state a claim. *Balint v. Carson City,* 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc) (summary judgment); *Berry v. Valence Technology, Inc.,* 175 F.3d 699, 706 (9th Cir. 1999) (Rule 12(b)(6) dismissal).

I

It has been clear for over thirty years that a state prisoner seeking injunctive relief against the denial or revocation of good-time credits must proceed in habeas corpus, and not under § 1983. *See Preiser,* 411 U.S. at 489, 93 S. Ct. 1827. Nonnette also seeks damages, however, and that issue was addressed by the more recent decision of *Heck v. Humphrey.* There, the Court held that a state prisoner's damages claims that necessarily implied the invalidity of his conviction or sentence could not be maintained under § 1983 unless the prisoner proved "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87, 114 S. Ct. 2364 (citation omitted).

The Supreme Court subsequently held that the *Heck* rule applied to a state prisoner who was seeking damages for unconstitutional deprivation of good-time credits, so long as the alleged constitutional violation would, if established, imply the invalidity of the deprivation of good-time credits. [FN3] *Edwards v. Balisok,* 520 U.S. 641, 648, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997). There is no question in this case that Nonnette seeks damages for the unconstitutional deprivation of the good-time credits themselves, and that if he succeeded in showing that the prison officials acted contrary to *all* of the evidence, a finding in his favor would imply the invalidity of the revocation and administrative segregation. In that regard, Nonnette's case parallels *Heck* and *Edwards.*

FN3. A prisoner who seeks damages only for being subjected to unconstitutional procedures, without

> implying the invalidity of (or seeking damages for) the resulting loss of good-time credits, may proceed under § 1983 without first invalidating his disciplinary proceeding. *See Heck,* 512 U.S. at 482-83, 114 S. Ct. 2364 (discussing *Wolff v. McDonnell,* 418 U.S. 539, 553-54, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)); *Edwards v. Balisok,* 520 U.S. 641, 645-46, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997).

Nonnette's case in its present posture differs, however, from *Heck* and *Edwards* in one respect that we conclude to be critical. After the district court entered its decision, Nonnette was released from the incarceration of which he complains, and is now on parole. Were he to seek a writ of habeas corpus, his petition would present no case or controversy because establishing the invalidity of his disciplinary proceeding could have no effect on the 360 days of additional incarceration or the 100 days of administrative segregation that resulted from it. Nor could such relief have any effect on the term of his parole. [FN4] As a consequence, his petition for habeas corpus would have to be dismissed as moot. *See Spencer v. Kemna,* 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). In *Spencer,* the Supreme Court held that, although a prisoner who has completed his sentence can challenge his *conviction* in habeas corpus because of the collateral consequences that survive his release, no such collateral consequences attended the prisoner's incarceration imposed for violation of parole. *Id.* at 14-16, 118 S. Ct. 978. Accordingly, the prisoner's petition was moot because he had served the term of incarceration resulting from his parole revocation. *See id.* at 18, 118 S. Ct. 978.

> FN4. The State does not contend that the length of Nonnette's parole term would be affected by invalidation of his disciplinary proceeding or by administrative recalculation of his date of release from incarceration. It argues only that Nonnette is still "in custody" while on parole, and thus qualifies for habeas relief. The relevant

> bar to habeas relief, however, is not the "in custody" requirement, but the "case or controversy" requirement, which would render Nonnette's claims moot if they were brought in a habeas corpus proceeding. *See Spencer,* 523 U.S. at 7, 118 S. Ct. 978.

We see no relevant distinction between the collateral consequences attending parole revocation and those attending Nonnette's deprivation of good- time credits. We are satisfied, therefore, that if he now filed a petition for habeas corpus attacking the revocation of his good-time credits and the imposition of administrative segregation (as well as the administrative calculation of his release date), his petition would have to be dismissed for lack of a case or controversy because he has fully served the period of incarceration that he is attacking.

That point brings us to the crucial question in this appeal: Does the unavailability of a remedy in habeas corpus because of mootness permit Nonnette to maintain a § 1983 action for damages, even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits? Although the answer is not entirely clear under *Heck* and its progeny, we join the Second and Seventh Circuits in concluding that, in these circumstances, a § 1983 claim may be maintained.

Admittedly, there is language in *Heck* suggesting that the prior overturning of an underlying conviction is invariably a prerequisite for a § 1983 action that implies the conviction's invalidity. *Heck's* analogy to malicious prosecution, which requires favorable termination of criminal proceedings as an element of the civil claim, is perhaps the strongest example. *See Heck,* 512 U.S. at 484, 114 S. Ct. 2364. But *Heck* dealt with a prisoner who was still incarcerated, and thus where a remedy in habeas corpus was available.

Spencer, on the other hand, dealt with a prisoner who had completed his term; indeed, that completion caused his habeas petition challenging revocation of parole to be dismissed as moot. *Spencer,* 523 U.S. at 18, 118 S. Ct. 978. One argument raised by Spencer was that his case should not be considered moot because, under *Heck,* his habeas action would be a prerequisite to a civil suit under § 1983. Justice Scalia's opinion for the Court characterized this argument as "a great non-sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.* at 17, 118 S. Ct. 978. But, if Justice Scalia's statement means that a § 1983 action is precluded even though a habeas petition would be dismissed as moot, five Justices disagreed with it. Justice Souter, writing for four concurring Justices, stated:

> *Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result. For all that appears here, then, Spencer is free to bring a § 1983 action, and his corresponding argument for continuing habeas standing falls accordingly.

Id. at 19, 118 S. Ct. 978 (Souter, J., concurring). Justice Stevens, who dissented on the issue of mootness, dropped a footnote stating:

> Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice SOUTER explains, that he may bring an action under 42 U.S.C. § 1983.

Id. at 25 n.8, 118 S.Ct. 978 (Stevens, J., dissenting).

Informed as we are by the opinions in *Spencer,* we conclude that *Heck* does not preclude Nonnette's § 1983 action. [FN5] In so ruling, we are in accord with the decisions of at least two of our sister circuits. *See Huang v. Johnson,* 251 F.3d 65, 75 (2d Cir. 2001) (discussing *Heck* and *Spencer* and concluding that a

§ 1983 action challenging denial of credit for time served in pre-trial incarceration was not barred by *Heck* because the incarceration had been fully served and habeas was unavailable); *Carr v. O'Leary,* 167 F.3d 1124, 1127 (7th Cir. 1999) (State will not be relieved of waiver of *Heck* defense because *Heck* does not appear to apply to plaintiff challenging loss of good-time credits after release from prison, when habeas is unavailable). [FN6]

FN5. We recognize that, if *Heck* precluded Nonnette's action, we would not be free to consider it undermined by the opinions in *Spencer.* The Supreme Court retains the sole prerogative of overruling its own decisions. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). We conclude that *Heck* does not control, and reach that understanding of *Heck's* original meaning with the aid of the discussions in *Spencer. See DeWalt v. Carter,* 224 F.3d 607, 617 n. 5 (7th Cir. 2000) ("[W]e rely on separate opinions not to overrule precedent, but to help guide us in deciding an open question.").

FN6. The fact that Nonnette has been released from the incarceration that his civil suit, if successful, would impugn, and that a habeas petition would be moot for that reason, differentiates this case from our recent decision in *Cunningham v. Gates,* 312 F.3d 1148 (9th Cir. 2002). In *Cunningham,* the plaintiff brought a civil suit that would have impugned the conviction for which he was still incarcerated; habeas corpus was unavailable only because he had let the time for such a petition expire. Under those circumstances, we declined to take the case out of the rule of *Heck. Cunningham,* 312 F.3d at 1154 n.3.

II

At the time the district court entered its decision in this case, Nonnette was still incarcerated. The district court therefore committed no error in deciding as it did in light of that circumstance, because habeas corpus would have been available to test the validity of the disciplinary proceeding (and the administrative calculations of Nonnette's sentence). The State argues that we must therefore affirm the district court's judgment, even though it imposes a prerequisite that Nonnette, having been released on parole, can no longer fulfill. We do not consider ourselves so bound, however, to an affirmance that leaves Nonnette with no conceivable remedy even if his constitutional objections are meritorious. In that regard we can do no better than to quote the Supreme Court:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition on the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

Patterson v. Alabama, 294 U.S. 600, 607, 55 S. Ct. 575, 79 L. Ed. 1082 (1935). Like the Supreme Court, we have statutory authority to provide such relief "as may be just under the circumstances." 28 U.S.C. § 2106. In this instance, we conclude that justice requires that we vacate the judgment of the district court and permit Nonnette to proceed with his § 1983 claims there. *Cf. Carr,* 167 F.3d at 1127 (indicating that a prisoner who was incarcerated at the time he filed his § 1983 action would not be subject to *Heck's* habeas requirement when he had been released after his suit was filed). [FN7]

FN7. We do not share the State's concern that our holding will encourage prisoners to delay their challenges to loss of good-time credits until their release is imminent or accomplished. The possibility of release from incarceration is the strongest incentive for prisoners to act promptly to challenge such administrative action by habeas corpus after administrative remedies are exhausted. We also emphasize that our holding affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus. *See Spencer,* 523 U.S. at 7-12, 118 S. Ct. 978.

III

As the parties recognize, the validity of the dismissals of Nonnette's miscalculation claims depends upon the same *Heck* considerations that underlie our decision regarding the summary judgment on the disciplinary proceeding. We therefore vacate the dismissals of those claims as well, and include them in our remand for further proceedings.

IV

Nonnette attempts to raise one additional matter in this appeal. He contends that his challenge to the imposition of 100 days administrative segregation was not subject to *Heck* in any event, because it does not contest the term of confinement but only the conditions of confinement. He asks us to join in the rule adopted by the large majority of the circuits that *Heck* does not apply to claims challenging only the conditions, and not the term, of confinement. *See Figueroa v. Rivera,* 147 F.3d 77, 82 (1st Cir. 1998); *Jenkins v. Haubert,* 179 F.3d 19, 27 (2d Cir. 1999); *Leamer v. Fauver,* 288 F.3d 532, 543-44 (3d Cir. 2002);

DeWalt v. Carter, 224 F.3d 607, 613 (7th Cir. 2000); *Brown v. Plaut,* 131 F.3d 163, 168 (D.C. Cir. 1997); *contra Huey v. Stine,* 230 F.3d 226, 230 (6th Cir. 2000).

The State contends that Nonnette waived this argument by not presenting it to the district court in opposition to the State's motion for summary judgment. Because we hold that *Heck* does not bar any of Nonnette's claims, we need not address the question whether Nonnette failed to establish an independent ground for precluding the application of *Heck* to the administrative segregation portion of his claim.

We agree with the State that Nonnette did not present a challenge to the *conditions* of his administrative segregation in the district court, either in his complaint or in any of his subsequent filings in the district court. He therefore made no attempt to establish that his administrative segregation "impose[d] atypical and significant hardship on[him] in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). His entire challenge to the administrative segregation was that it was imposed as a result of a disciplinary hearing in which the adverse finding was supported by no evidence. We have held that such a lack of fair hearing violates due process, wholly apart from the conditions of confinement and without regard to the *Sandin* requirements. *Burnsworth v. Gunderson,* 179 F.3d 771, 775 (9th Cir. 1999). Nonnette clearly has not waived this claim, and may pursue it on remand.

Conclusion

The judgment of the district court dismissing Nonnette's first two claims and granting summary judgment against him on the third claim is vacated, and the matter is remanded to the district court for further proceedings.

VACATED AND REMANDED.

APPENDIX B

[Filed Aug. 5, 1999]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NARVIS G. NONNETTE, Plaintiff, v. LARRY SMALL, et al., Defendants.	Civil No. 98-1716-AJB Order Granting in Part and Denying in Part Motion to Dismiss Second Amended Complaint; Denying Motion for Leave to Amend

Plaintiff, a state prisoner proceeding pro se, and currently incarcerated at Calipatria State Prison, has filed a second amended civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims that prison officials at both Calipatria and Folsom State Prison have violated his due process rights by improperly calculating good-time credits, failing to assign him to a high-credit earning work group, placing him in administrative segregation, and revoking good-time credits based on insufficient evidence in a disciplinary proceeding. Plaintiff seeks injunctive relief preventing the defendants from depriving him of his liberty without procedural due process, a determination as to whether his present and future confinement is illegal, and an order commanding that the defendants show cause why he should not be released from prison forthwith. [Complaint, pp. 7-7A]. Plaintiff also seeks compensatory and punitive damages.

Defendants now move the Court for dismissal of the second amended complaint ("SAC") on the following grounds:

(1) Plaintiff's claims against Defendants are not cognizable under 42 U.S.C. § 1983 pursuant to Heck v. Humphrey, 512 U.S. 477 (1994); (2) Plaintiff has failed to exhaust his administrative remedies; and (3) Plaintiff's claims are barred by the statute of limitations. Plaintiff lodged several exhibits apparently in opposition to the motion, but did not file a substantive opposition to the motion to dismiss. Plaintiff also filed a motion requesting leave to amend his complaint to add a further claim for denial of due process with regard to the prison's procedure which denies inmates good-time credits on days that they use the law library during their work hours. The Court finds these motion appropriate for submission on the papers and without oral argument pursuant to Local Rule 7.1(d)(1).

1. Failure to State a Claim Upon Which Relief Can Be Granted

Defendants argue that Plaintiff's claims should be dismissed under Fed. R. Civ. P. 12(b)(6) because Plaintiff has failed to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the claims in the complaint. A claim can only be dismissed if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, and must construe the complaint in the light most favorable to the plaintiff. N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). The court looks not at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhoades, 416 U.S. 232, 236 (1974).

Where a plaintiff appears in propria persona in a civil rights case, the court must construe the pleadings liberally and afford the plaintiff any benefit of the doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is "particularly important in civil rights cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the court may not "supply essential elements of the claim that were not initially pled." Ivey v. Bd. of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Id.

Habeas corpus is the exclusive remedy for a state prisoner challenging the fact or duration of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973). A state prisoner who seeks "immediate or speedier release" must pursue such a claim through habeas corpus "even though such a claim may come within the literal terms of § 1983." Heck v. Humphrey, 512 U.S. 477, 481 (1994).

In addition, a claim for damages which bears a direct relationship to the legality of a sentence is not cognizable under 42 U.S.C. § 1983 unless the plaintiff can demonstrate that the conviction has been reversed or otherwise invalidated. Heck, 512 U.S. 477, 487 (1994) .

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question

> by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck, 512 U.S. at 486-87. This rule is applicable where a prisoner challenges the procedures used by the prison to deprive him of good-time credits, without requesting that the credits be restored. Edwards v. Balisok, 520 U.S. 641, 648 (1997). Under the Heck and Edwards cases, the question for the court is "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Heck, 512 U.S. at 487.

Counts One and Two of Plaintiff's SAC are properly dismissed at this time. Counts One and Two of the SAC allege that Plaintiff's sentence has been extended without due process. Plaintiff seeks the following relief with regard to Counts One and Two of his SAC:

> (a) a court ordered Haygood Hearing in a federal courthouse with a federal Magistrate sitting as a impartial referee with regards to Counts One and Two;
>
> (b) . . . a determination on the evidence presented at the Haygood Hearing as to whether plaintiff's present and future confinement is illegal and in violation of the Eighth and Fourteenth Amendments;
>
> (c) . . . injunctive relief commanding that the herein named Defendant's Show Cause why plaintiff should not be released from prison forthwith on Counts One and Two. . . .

[Complaint, p. 7 A]. *Plaintiff clearly seeks a determination by* this Court on Counts One and Two of his SAC reagrding the legality of his continuing confinement. Such claim must be raised through a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973). In addition, to the extent that counts One and Two seek monetary damages as a result of the alleged illegal continuing confinement, those claims are barred by Heck and Edwards until such time as he can show that his continuing confinement has been invalidated. Defendants' motion to dismiss Counts One and Two of Plaintiff's SAC is GRANTED and those claims are hereby DISMISSED.

The Court finds, however, that Count Three is not properly dismissed on this motion. Count Three of Plaintiff's SAC alleges that there was insufficient evidence to support disciplinary against him with regard to a July 4, 1998 incident. In his SAC, Plaintiff states that on December 4, 1998, plaintiff received "a chrono from CSR Board member R. Hargrove rejecting and invalidating the disciplinary findings in count three of this complaint on the grounds that 'the circumstances and evidence do not support the finding of guilt rendered in the CDC 115 dated 7-4-98'." [Complaint, p.5-D; Notice of Lodging Exhibits, filed July 2, 1999, Exhibit M]. Therefore, Plaintiff has satisfied the requirements of Heck and Edwards for purposes of this motion, such that Plaintiff's claim under Count Three of the SAC may proceed. Defendant's motion to dismiss Count Three for failure to state a claim is DENIED.

2. Failure to Exhaust Administrative Remedies

Defendants also argue that Plaintiff's claims should be dismissed for failure to exhaust administrative remedies. Because the Court finds that Counts One and Two fail to state a claim upon which relief can be granted, and are therefore properly dismissed, there is no need to address exhaustion as to

these claims. The Court will only review whether Plaintiff has exhausted his administrative remedies with regard to Count Three.

Before the Prison Litigation Reform Act ["PLRA"], Pub. L. No.104-134, Title VIII, §§ 801-10, 110 Stat. 1321-66 to 1321-77 (1996), was enacted, prisoners challenging the conditions of confinement under 42 U.S.C. § 1983 were not generally required to exhaust administrative remedies prior to filing suit in district court. See Patsy v. Bd. of Regents, 457 U.S. 496, 500-01 (1982). The PLRA amended 42 U.S.C. § 1997e(a), however, to provide that "[n]o action shall be brought with respect to prison, conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

Defendants move to dismiss under Fed. R. Civ. P. 12(b) on the grounds that Plaintiff has failed to exhaust prison grievance procedures pursuant to 42 U.S.C. § 1997e(a). "Failure to exhaust nonjudicial remedies is a matter in abatement" not going to the merits of the case and is properly raised pursuant to a motion to dismiss, including a non-enumerated motion under Federal Rule of Civil Procedure 12(b). Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988). "Non-enumerated" Rule 12(b) motions are governed by the general motion provisions in the federal rules,
including Fed. R. Civ. P. 43(e), which permits the hearing of motions based on facts outside the record on affidavits submitted by the parties. Id.; 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 1360 (2d ed. 1990).

The administrative appeal system for inmates in the California prison system is described in Title 15 of the California Code of Regulations. "Any inmate or parolee under the [California Department of Corrections'] jurisdiction may appeal any departmental decision, action, condition or policy

perceived by those individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust administrative remedies, a prisoner must first attempt to informally resolve the problem with the "staff [member] involved in the action or decision being appealed." Id. § 3084.5(a). If unsuccessful, the prisoner must then submit a formal appeal on an inmate appeal form (i.e., a CDC 602 form)[1/] to the institution's Appeals Coordinator or Appeals Office, id. § 3084.5(b), and if unsuccessful there, must submit a formal appeal for second level review, id. § 3084.5(c), which is conducted by the institution head or designee. Id. § 3084.5(e)(1). Finally, the prisoner must submit a formal appeal for third level review to the Director of the California Department of Corrections or the Director's designee. Id. § 3084.5(e)(2). The Director's Level Decision "shall be final and exhausts all administrative remedies available in the Department [of Corrections]." See Cal. Dept. of Corrections Operations Manual, § 54100.11, "Levels of Review."

Plaintiff has apparently exhausted his administrative remedies with regard to Count Three. Exhibit K-A of Plaintiff's Notice of Lodging of Exhibits, filed July 2, 1999, is a Director's Level Appeal Decision dated December 18,1998, with regard to the July 4,1998 incident which is the basis of Count Three of the SAC. This decision exhausted Plaintiff's administrative remedies with regard to allegations of Count Three. Therefore,

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1. An "Inmate/Parolee CDC 602" is the form California prisoners must complete to initiate a claim challenging condition of confinement or prison disciplinary action taken against them. The filing of the 602 initiates the prison administrative grievance process. See Cal. Code Regs., tit. 15, § 3084.2(a) ("The appellant shall use a CDC Form 602 (rev. 12-87), Inmate/Parolee Appeal Form, to describe the problem and action requested.").

Defendants' motion to dismiss Plaintiffs Count Three for failure to exhaust administrative remedies is DENIED.

3. Statute of Limitations

Defendants also argue that Plaintiff's claims are barred by the statute of limitations. Under the relevant federal and state authorities, Plaintiff has three years from the date of the alleged incident in which to file suit. Wilson v. Garcia, 471 U.S. 261, 279-80 (1985) (federal courts look to state law to determine the applicable statute of limitations under 42 U.S.C. § 1983); McDougal v. County of Imperial, 942 F.2d 668, 672-73 (9th Cir. 1991) (under California law, the statute of limitations for a civil rights claim is one year); Cal. Code Civ. Proc. § 352.1(a) (statute of limitations tolled for up to two years where plaintiff is imprisoned on less than a life term).

Because the Court has found that Counts One and Two are properly dismissed under Heck and Edwards, there is no need to address whether those claims are also barred by the statute of limitations. As to Count Three, the actions which are the basis for Plaintiff's claim occurred on or after July 4, 1998. as such, these claims are clearly not barred by the statute of limitations. Defendants' motion to dismiss Count Three based upon the statute of limitations is DENIED.

4. Plaintiff's Motion for Leave to Amend

On June 30, 1999 Plaintiff filed a motion requesting leave to amend his SAC to add an additional claim for violation of due process. Plaintiff's proposed Count Four challenges the procedure of California State Prison of issuing A-days to inmates with Court ordered deadlines who use the law library during their work hours, resulting in the inmate earning zero credit for that day. "Plaintiff contends that he has suffered numerous A-days as a result of using the law library during his work hours resulting in his sentence being extended one day for

each day that he used the prison law library during his work hours." [Motion for Leave to Amend, filed June 30,1999, p.3] Plaintiff again seeks "a court ordered Haygood Hearing in a Federal Court-house with a Federal Magistrate sitting as a impartial referee" and "a determination on the evidence presented at the Haygood hearing as to whether the A-days issued to plaintiff on days that he used the law library caused his sentence to be extended without Due Process." [Id., p. 6] Plaintiff also seeks compensatory and punitive damages. [Id.]

Rule 15(a) of the Federal Rules of Civil Procedure provides that any party may amend their complaint once "as a matter of course" before a responsive pleading is served. Thereafter, amendment may be made only upon leave of the court or written stipulation. "The Supreme Court has instructed the lower federal courts to heed carefully the command of Rule 15(a), Fed. R. Civ. P., by freely granting leave to amend when justice so requires." Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973) (citing Foman v. Davis, 371 U.S. 178 (1962)).

Four factors relevant to the analysis of whether a motion for leave to amend should be denied are (1) undue delay, (2) bad faith or dilatory motive, (3) futility of amendment, and (4) prejudice to the opposing party. Foman, 371 U.S. at 182; Moore v. Kayport Package Express, 885 F.2d 531, 538 (9th Cir. 1989). Here, Plaintiff's request to amend his SAC to add Count Four is futile. Like Counts One and Two of Plaintiff's SAC, Plaintiff's proposed Count Four "calls[s] into question the lawfulness of the plaintiff's continuing confinement." Heck, 512 U.S. at 483. As such, before Plaintiff may maintain an action under 42 U.S.C. § 1983 on his claim that his sentence has been unconstitutionally extended by the denial of good-time credits, he must show that the prison's actions have been invalidated. Id. at 486-87; Edwards, 520 U.S. at 648. Plaintiff's motion for leave to add Count Four is DENIED.

Conclusion

For the reasons set forth herein, it is hereby ordered as follow:

1. Defendants' motion to dismiss Counts One and Two of Plaintiff's Second Amended Complaint is GRANTED;
2. Defendants' motion to dismiss Count Three of Plaintiff's Second Amended Complaint is DENIED;
3. Plaintiff's motion for leave to amend to add Count Four is DENIED.

IT IS SO ORDERED.

Dated: 8/4/99

/s/
ANTHONY J. BATTAGLIA
United States Magistrate Judge

cc: All Counsel of Record

APPENDIX C

[Filed Apr. 7, 2000]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NARVIS G. NONNETTE, Plaintiff, v. LARRY SMALL, et al., Defendants.	Civil No. 98-1716-AJB Order Granting Defendants' Motion for Summary Judgment

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, has filed a second amended civil rights complaint ("SAC") pursuant to 42 U.S.C. § 1983. Plaintiff claims that prison officials at Calipatria State Prison have violated his due process rights by improperly revoking good-time credits based on insufficient evidence in a disciplinary proceeding.[1/] The only remaining Defendants are Defendants Small, Schelke, and Builteman. Plaintiff seeks injunctive relief and compensatory and punitive damages.

The remaining Defendants move the Court for summary judgment on the SAC under Edwards v. Balisok, 520 U.S. 641, 645 (1997) and Heck v Humphrey, 512 U.S. 477 (1994), which bar a civil rights action for damages where the ruling would "necessarily imply the invalidity" of the conviction or sentence.

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1. Plaintiff's SAC also contained two additional claims, which were dismissed by the Court on August 5, 1999.

On January 27, 2000, the Court provided Plaintiff with notice of the requirements for opposing summary judgment pursuant to Klingele v. Eikenberry, 849 F.2d 409, 411-12 (1988) and Rand v. Rowland, 154 F.3d 952, 960-61 (9th Cir.. 1998) (en banc). Plaintiff has filed an opposition and Defendants have filed a reply. The Court finds this motion appropriate for submission on the papers and without oral argument pursuant to Local Rule 7.1(d)(1).

Factual History

Plaintiff challenges a disciplinary finding of battery of another inmate with serious injury. The incident which was the subject of the disciplinary finding occurred on July 4, 1998. Earlier that morning, two separate incidents of inmate fighting had resulted in the yard being ordered down. Deposition of Narvis Nonnette, October 15, 1999, at 18-29. Afterwards, Plaintiff saw members of the San Diego Bloods street gang attack two members of the Los Angeles Crips street gang. Nonnette Depo., at 25-29. Plaintiff, as a member of the Crips gang, and other Crips rushed over and joined in the fight. Id. at 34-35. One of the Bloods involved in fighting with Plaintiff, at some point, suffered a stab wound to his right side, mid neck. Id. at 43. Although Plaintiff admitted to mutual combat with the victim (McBride), Plaintiff denied stabbing McBride, instead arguing that McBride was stabbed earlier in the morning. Id. at 44. As such, Plaintiff argues he should have only been found guilty of participating in a riot, and should have only received a 90 day loss of credit. Id.

At the disciplinary hearing on July 24, 2998, Plaintiff stated he would enter a guilty plea to mutual combat, but that McBride had been stabbed about an hour before his fight with Plaintiff. Exh. 2 to Plaintiff's Opposition to Motion for Summary Judgment. It was found, however, that Plaintiff was guilty of battery on an inmate causing serious injury, and Plaintiffs was assessed 360 days loss of credit. Id. Plaintiff

claims there was no evidence to support this finding, such that his rights to due process were violated.

Discussion

Defendants move for summary judgment based upon the fact that the claims brought by Plaintiff are barred pursuant to Heck v. Humphrey, 512 U.S. 477 (1994) and Edwards v. Balisok, 520 U.S. 641 (1997).

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure authorizes the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for the granting of a directed verdict. Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict . . . . If reasonable minds could differ," judgment should not be entered in factor of the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

The moving party bears the initial burden of identifying the elements of the claim in the pleadings, or other evidence, which the moving party "believes demonstrates the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Zoslaw v. MC Distrib. Corp., 693 F.2d 870, 883 (9th Cir..1982), cert. denied, 460 U.S. 1085 (1983). "A Material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." S.E.C. v. Seaboard Corp., 677 F.1301, 1305-06 (9th Cir..1982). The burden then shifts to the

nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. Celotex, 477 U.S. at 324. More than a "metaphysical doubt" is required to establish a genuine issue of material fact. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Finally, the parties bear the same substantive burden of proof as would apply at a trial on the merits, including plaintiff's burden to establish any element essential to his case. Liberty Lobby, 477 U.S. at 252; Celotex, 477 U.S. at 322; Taylor v. List, 880 F.2d 1040, 1045 (9th Cir..1989).

In ruling on a motion for summary judgment, the court need not accept legal conclusions "cast in the form of factual allegations." Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir..), cert. denied, 454 U.S. 1031 (1981). "No valid interest is served by withholding summary judgment on a complaint that wraps nonactionable conduct in a jacket woven of legal conclusions and hyperbole." Vigliotto v. Terry, 873 F.2d 1201, 1203 (9th Cir.. 1989).

B. Plaintiff's Due Process Claim

There are no genuine issues of material fact that preclude summary judgment. Although Plaintiff disputes the factual finding that he stabbed inmate McBride, this issue is not germane to the determination of whether or not Plaintiff may bring this cause of action under 42 U .S.C. § 1983. The only issue on this motion is whether or not Plaintiff's continued confinement has been rendered invalid or otherwise called into question. Plaintiff sets forth no factual dispute in this regard.

Habeas corpus is the exclusive remedy for a state prisoner challenging the fact or duration of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973). A state prisoner who seeks "immediate or speedier release" must pursue such a claim through habeas corpus "even though such a claim

may come within the literal terms of § 1983." Heck v. Humphrey, 512 U.S. 477, 481 (1994).

In addition, a claim for damages which bears a direct relationship to the legality of a sentence is not cognizable under 42 U.S.C. § 1983 unless the plaintiff can demonstrate that the conviction has been reversed or otherwise invalidated. Heck, 512 U.S. 477, 487 (1994).

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck, 512 U.S. at 486-87. This rule is applicable where a prisoner challenges the procedures used by the prison to deprive him of good-time credits, without requesting that the credits be restored. Edwards v. Balisok, 520 U.S. 641, 648 (1997). Under the Heck and Edwards cases, the question for the court is "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Heck, 512 U.S. at 487. Even where a plaintiff contends that prison officials improperly considered false information in making a decision regarding the length of his confinement, no cause of action lies unless and until the

underlying decision has been invalidated. Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir. 1996).

In its order denying Defendants' motion to dismiss, the Court noted that on December 4, 1998, plaintiff received "a chrono from CSR Board member R. Hargrove rejecting and invalidating the disciplinary findings in count three of this complaint on the grounds that 'the circumstances and evidence do not support the finding of guilt rendered in the CDC 115 dated 7-4-98'." [Complaint, p.5-D; Notice of Lodging Exhibits, filed July 2, 1999, Exhibit M]. The Court found that this satisfied the requirements of Heck and Edwards for purposes of the motion to dismiss.

In the motion for summary judgment, defense counsel explains that because Plaintiff was assessed a 15 month Segregated Housing Unit ("SHU") term on the disciplinary finding, Plaintiff was considered for transfer to Corcoran or Tehachapi State Prisons. Exh. 2 to Memorandum of Points and Authorities in Support of Motion for Summary Judgment (Def. Exh. 2). In order for such a transfer to occur, the transfer request had to be approved by a Classification Services Representative ("CSR"). In Plaintiff's case, three separate CSRs reviewed the transfer request. Although the first and third CSR approved the transfer, the second one, CSR Hargrove, recommended that the finding be reheard. Def. Exh. 2. Such recommendation could not, however, invalidate the earlier finding of guilt. Def. Exh. 2.

Despite the evidence submitted by Plaintiff indicating that he may not have actually been the person who stabbed inmate McBride, no cause of action exists under 42 U .S.C. § 1983 until such time as the finding has been invalidated or otherwise called into question. Plaintiff has failed to present

any evidence precluding summary judgment in this regard. Therefore, Defendants are entitled to summary judgment.[2/]

---

2. In his opposition, Plaintiff cites Burnsworth v. Gunderson, 179 F.3d 771 (9th Cir. 1999). In Burnsworth, the Ninth Circuit upheld the trial court's expungement of a prisoner's conviction on a charge of escape where there was absolutely no evidence to sustain such conviction. Plaintiff in that case had been convicted of a charge of escape based upon his statements to prison officials that "if he were returned to the general population his only option would be to 'hit the fence'" meaning that he "would be forced to 'hop the fence and run all the way to Tucson'." Burnsworth, 179 F.3d at 772. The opinion in Burnsworth does not even discuss Heck and Edwards, and makes no inquiry of the prior invalidation of the conviction. In light of clear United States Supreme Court authority requiring prior invalidation in order to maintain an action under 42 U.S.C. § 1983, the decision in Burnsworth does not preclude summary judgment in this case. In addition, Burnsworth is distinguishable because in the current case, while the evidence may be disputed, there is "some evidence" to support the disciplinary finding. Superintendent v. Hill, 472 U.S. 445, 457 (1985).

Conclusion

For the reasons set forth herein, Defendants' motion for summary judgment is GRANTED. Plaintiffs third and only remaining cause of action is dismissed, terminating this case.

IT IS SO ORDERED.

Dated: 4/6/00

/s/
ANTHONY J. BATTAGLIA
United States Magistrate Judge

cc: All Counsel of Record

[Filed Apr. 7, 2000]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

CASE NUMBER 3:98-CV-01716

Nonnette – PLAINTIFF

v.

Small – DEFENDANT

___ JURY VERDICT. This action came before the [illegible] trial by jury. The issues have been [illegible] jury has rendered its verdict.

_X_ DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT Defendant's motion for summary judgment is granted [42-11]; Plaintiff's third and only remaining cause of action is dismissed

4/7/00
Date

Roberta Westdal
Clerk

/s/
by L. Hines, Deputy Clerk

Entered on 4/7/00
pre – Battaglia
ref – Unassigned

APPENDIX D

[Filed Feb. 12, 2000]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARVIS G. NONNETTE,

Plaintiff - Appellant,

v.

LARRY SMALL; R. SCHELKE; E. CASTRO; D. JOHNSON; M.A. CORBIN; J. BUILTMAN,

Defendants - Appellees.

No. 00-55702

D.C. No. CV-98-01716-AJB

ORDER

Before: LAY, CANBY and PAEZ, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for panel rehearing. Judge Paez voted to deny the petition for rehearing en banc, and Judges Canby and Lay have so recommended.

The petition for en banc rehearing has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX E

42 U.S.C. § 1983 (1996)
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2254 (1996)
State custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.